

## HUMAN SERVICES BOARD

In re ) Fair Hearing No. 20,250  
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Appeal of )

Petitioner appeals a decision of the Department of Aging and Independent Living, Division of Vocational Rehabilitation (VR) to terminate services. The petitioner is represented by Don Parrish, paralegal of the Vermont Client Assistance Program, Disability Law Project of Vermont Legal Aid; and the department is represented by Dena Monahan, General Counsel of the Department of Aging and Independent Living.

The following facts are based upon the briefs and materials submitted by the parties including VR records and medical records. To the extent that petitioner's history as a previous recipient of VR services and past medical history are relevant, they are incorporated into the Findings of Fact and following decision.

The issue is whether VR correctly applied the statutory standards for terminating services to an eligible participant.

## FINDINGS OF FACT

1. Petitioner is a fifty-year-old man receiving disability benefits from the Social Security Administration. Petitioner's diagnosis is schizophrenia.

2. Petitioner has never been hospitalized for his schizophrenia but has received intermittent services from mental health providers including treatment from April 2003 through February 2004 and during September 2005 from Northwestern Counseling & Support Services (NCSS). Petitioner received psychotropic medications for a short period at the beginning of his treatment in 2003. Petitioner did not find the treatment or medication helpful. Petitioner was evaluated by Dr. Robert Duncan of NCSS on May 16, 2003 who diagnosed petitioner with "schizophrenia, probably the paranoid type". Dr. Duncan noted petitioner's belief that he is being persecuted and is a victim of injustice, but also noted that petitioner has "a fairly modest case of schizophrenia".

3. In the past, petitioner found that his social security number had been misused. Petitioner has become fixated on what he perceives to be the impacts of the social security number mix-up.

4. Petitioner has worked intermittently over the years. He last worked part-time as a produce clerk at a

Hannaford's grocery store from October 13, 2004 to August 17, 2005; he left his job when he relocated from Lamoille County to Franklin County.

5. Petitioner successfully received services from the Lamoille office of VR during 2004. Petitioner had intermittent contact with the Lamoille office of VR starting in 2001. When petitioner first requested services during May 2001, he was found to meet eligibility criteria but there was a notation that without mental health treatment, the VR worker did not believe petitioner could obtain or keep employment. A case was not opened at that time. VR found petitioner eligible in 2004 and opened a case. An Individual Plan for Employment (IPE) was completed on October 19, 2004 even though petitioner disagreed with the suggestion that he needed to work with the local supported employment program. Working with the local supported employment program was not a condition of eligibility for VR service; instead, VR noted that petitioner's decision might impact the scope of VR services. In the IPE, petitioner's employment goal was part-time produce clerk. The VR counselor advised petitioner to seek mental health services during their contacts. Although petitioner did not follow the VR counselor's advice to obtain mental health services, petitioner continued to receive

services. At the time petitioner entered into the IPE, petitioner had obtained a job at Hannaford's. Petitioner's VR case was successfully closed on April 27, 2005 when petitioner's VR counselor wrote him to explain they were closing his case because petitioner had successfully reached his employment goal and maintained employment for more than 90 days. It should be noted that the petitioner was not receiving mental health services during the period he worked at Hanafords and had an open case with the Lamoille office of VR.

6. During the fall of 2005, petitioner contacted the Franklin VR office for services. Petitioner met with VR Counselor Hib Doe. An initial interview took place on November 9, 2005. On that date, petitioner was found presumptively eligible for VR services based on petitioner's disability due to schizophrenia and based upon identifying petitioner as a person who needed VR services to realize employment.

7. Petitioner and Doe continued to meet periodically during the fall and winter of 2005-2006. During those meetings, Doe tried to refer petitioner to NCSS for services.

8. On January 11, 2006, petitioner and Doe signed an IPE. Petitioner identified his employment outcome as

computer programming. VR's responsibilities were to provide counseling and guidance, referrals to appropriate agencies and financial support. Petitioner's responsibilities were to participate in job search, demonstrate good work ethic and keep in contact with VR. In addition, the IPE identified services that were needed to achieve the employment outcome including beginning dates and provider. Those services were:

	<b>To begin</b>	<b>Provider</b>
Counseling and Guidance	1/06	VR
Medical Care	Ongoing	Dr. Bruno
Mental Health Care	As needed	NCSS
Computer Training	Feb/Mar 06	NWTC
Computer/Printer	Mar 06	
RecycleNorth		
Benefits Counseling	1/06	VR

Petitioner was referred to VSAC to fund computer classes at Northwest Technical Center (NWTC). In terms of mental health care, the IPE did not define "as needed" or who made that determination.

9. Petitioner obtained funding from VSAC and enrolled in two computer classes at NSTC. During the pendency of this case, petitioner successfully completed Beginning/Intermediate Keyboarding on April 18, 2006 and Introduction to Computer Applications from A to Z on May 8, 2006.

10. On February 7, 2006, petitioner and Don Parrish met with Doe. Petitioner was excited about the start of his computer classes. At that meeting, Doe wanted to refer petitioner to the CRT program at NCSS (psychiatric case management). Doe did not believe that petitioner could benefit from VR services unless petitioner received treatment for his mental health issues. Petitioner refused to do so. Doe stated that VR services would not continue unless petitioner agreed to be evaluated by NCSS and follow any treatment recommendations. Arrangements were then made for an administrative review.

11. Doe characterized his actions as a suspension of services. However, by suspending services, Doe was in effect terminating petitioner's eligibility for VR services.

12. An administrative review was held on March 15, 2006 before Review Officer Alan Willard. Petitioner was represented by Parrish at the review. The Review Officer found that VR's actions were consistent with VR policy.

13. Prior to the administrative review, petitioner acting *pro se* requested a fair hearing of the VR termination on March 3, 2006. Petitioner, at the conclusion of his administrative review, indicated he wanted to pursue the fair hearing.

14. Parrish entered an appearance before the Human Services Board. The case was initially assigned to Hearing Officer Dan Jerman who presided over two status conferences in which the parties agreed to submit their case through written argument with accompanying documentation. The case was transferred to Hearing Officer Lila Shapero on July 13, 2006 and written argument was subsequently received.

ORDER

VR's decision is reversed.

REASONS

The federal statutes authorizing vocational rehabilitation and providing funding to states are remedial acts and should be liberally construed. 29 U.S.C. §§ 720 *et seq.* and Rehabilitation Act, Sec. 2(b). Congress has recognized that individuals with disabilities including individuals with significant disabilities have shown their ability to work and Congress has recognized that barriers prevent individuals with disabilities from entering the workforce including lack of training, education, and supports needed to obtain or maintain employment. 29 U.S.C. § 720(a)(1)(C)(D).

To realize vocational rehabilitation goals, individuals with disabilities are partners in the process. This policy is codified at 29 U.S.C. § 720(a)(3) which states:

It is the policy of the United States that such a program be carried out in a manner consistent with the following principles:

- (C) Individuals who are applicants for such programs or eligible to participate in such programs must be active and full partners in the vocational rehabilitation process, making meaningful and informed choices—
  - (1) during assessments for determining eligibility and vocational rehabilitation needs; and
  - (ii) in the selection of employment outcomes for the individuals, services needed to achieve the outcomes, entities providing such services, and the methods used to secure such services.

See also Rehabilitation Act, § 2(b), and Vermont Division of Vocational Rehabilitation regulations § 1.1.

Petitioner is an individual who is eligible to participate in VR programs. VR found petitioner presumptively eligible on November 9, 2005.<sup>1</sup> Based on this

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<sup>1</sup> Pursuant to 29 U.S.C. § 722(a)(3)(A), individuals such as petitioner who receive disability benefits from the Social Security Administration are presumed eligible for vocational rehabilitation services unless there is "clear and convincing evidence that such individual is incapable of benefiting in terms of an employment outcome outcome from vocational rehabilitation services due to the severity of the disability of the individual in accordance with paragraph (2)". Paragraph 2 refers to the obligation of the VR agency to use trial work experiences to determine if there is clear and convincing evidence that the individual cannot benefit from VR services due to the severity of his disability.



eligibility finding, petitioner and VR entered into an IPE on January 11, 2006. Petitioner's employment outcome was computer programming. Petitioner started the process by obtaining funds through VSAC for relevant coursework at the Northwest Technical Center.

Once VR found petitioner eligible for services, VR could not stop services without following appropriate procedures to determine that petitioner was now ineligible for services. Determinations of ineligibility are governed by 29 U.S.C. § 722(a)(5) which states:

. . . if an eligible individual receiving services under an individualized plan for employment is determined to be no longer eligible for the services—

(A) the ineligibility determination involved shall be made only after providing an opportunity for a full consultation with the individual or, as appropriate, the individual's representative;

(B) the individual or as, appropriate, the individual's representative shall be informed in writing<sup>2</sup> (supplemented as necessary by other appropriate means of communication consistent with the informed choice of the individual) of the ineligibility determination, including—

- (i) the reasons for the determination; and
- (ii) a description by which the individual may express, and seek a remedy for,

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<sup>2</sup> The record does not include a written notice setting out this determination. However, the petitioner has not raised this point regarding the process in this case.

any dissatisfaction with the  
determination. . .

VR has characterized their actions as a suspension. However, in suspending their services, they have effectively terminated petitioner's eligibility and have done so without following appropriate procedures. By not following appropriate procedures, VR has not met their burden of showing by clear and convincing evidence that petitioner's disability is so severe that he cannot benefit from rehabilitation services. 29 U.S.C. § 722(a)(2), 34 C.F.R. § 361.42(a)(2). See VR State Regulations § 1.13, VR Policy and Procedures Manual Chapter 204.

A note to 34 C.F.R. § 361.42 defines "clear and convincing evidence" as follows:

*Clear and convincing evidence* means that the designated state unit shall have a high degree of certainty before it can conclude that an individual is incapable of benefiting from services in terms of an employment outcome. The "clear and convincing" standard constitutes the highest standard used in our civil system of law and is to be individually applied on a case by case basis. The term *clear* means unequivocal. . Clear and convincing evidence might include a description of assessments, including situational assessments and supported employment assessments, from service providers who have concluded that they would be unable to meet the individual's needs due to the severity of the individual's disability. The demonstration of "clear and convincing evidence" must include, if appropriate, a functional assessment of skill development activities, with any necessary

supports. . .in real life settings. (S.Rep. No. 357, 102<sup>nd</sup> Cong., 2d Sess. 37-38(1992)).

The definition of "clear and convincing evidence" needs to be read in conjunction with the requirements that if there are questions about whether an applicant or eligible participant is unable to benefit from services due to the severity of his/her impairment then the state agency is to use trial work experiences to test the person's abilities in work settings. 29 U.S.C. § 772(a)(2). This has not happened in petitioner's case.

VR has argued that petitioner's case is similar to Fair Hearing No. 18,879 in which the Human Services Board affirmed VR's decision to refuse services until the individual had a mental health assessment.<sup>3</sup> However, Fair Hearing No. 18,879 does not support VR's position because the facts are so different.

In Fair Hearing No. 18,879, VR had provided services to the individual for over eight years. During that time, the individual failed in numerous job settings. There were reports of out of control anger including swearing with employers, fellow employees and the public. The individual

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<sup>3</sup> The Human Services Board decision was affirmed in an Entry Order by the Vermont Supreme Court, Docket No. 2005-049 on October 28, 2005.

acted in the same manner with VR staff. There were numerous work assessments to support VR's decision.

In contrast, petitioner had a successful job outcome with VR in the past during a period in which petitioner was not receiving mental health services. Petitioner successfully concluded the computer courses that were part of his IPE. Although one can assume that the VR counselor found communication with petitioner difficult due to petitioner's disability and can sympathize with this difficulty, this difficulty alone is not sufficient to meet VR's evidentiary hurdle that petitioner would be unable to benefit from VR services due to the severity of his disability without a showing that trial work experiences had failed.

Although VR has characterized this case as a suspension, this case is actually a termination of services. The argument that the issue is petitioner's failure to cooperate misses the point that there is a lack of clear and convincing evidence in the record to support a finding that petitioner cannot benefit from VR services due to the severity of his disability; and, that as a result, conditioning services upon a mental health assessment is appropriate.

Accordingly, the decision by VR to stop services for the petitioner is reversed.

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Denial of Motion to Remand

The Recommended Decision was sent to the parties on November 8, 2006 and originally scheduled for the November 15, 2006 Board Meeting. The matter was continued to the January 3, 2007 Board meeting as DAIL's attorney had a conflict.

DAIL filed a Motion for Remand on December 15, 2006 asking that the recommended decision be set aside to allow for testimony from DAIL. The Motion for Remand did not make a proffer of specific evidence that could lead to a different result nor was the Motion for Remand supported by affidavits from the Vocational Rehabilitation Counselor. The petitioner filed a responsive pleading to the Motion on December 29, 2006.

The Board heard argument on January 3, 2007 and denied the Motion for Remand noting that the matter had gone on for too long and that it was time to provide services for the petitioner. Petitioner had initially requested a fair hearing on March 3, 2006.

Although the Board did not reach this issue on the record, DAIL's Motion for Remand did not include a sufficient proffer of evidence that could support an argument that testimony could lead to a different result.